JANICE D. SCHAKOWSKY
9TH DISTRICT, ILLINOIS

COMMITTEE ON ENERGY AND COMMERCE
Ranking Member, Digital Commerce and Consumer Protection
Health
Oversight and Investigations

COMMITTEE ON THE BUDGET

CHIEF DEPUTY WHIP

1074

Congress of the United States
House of Representatives
Washington, DC 20515-1309

2367 RAYBURN HOUSE OFFICE BUILDING
Telephone: 202-225-2111
Fax: 202-226-6890
TTY: 202-224-3901

5533 N. BROADWAY, SUITE 2
CHICAGO, IL 60640
Telephone: 773-506-7100
Fax: 773-506-9202

1852 JOHNS DRIVE
GLENVIEW, IL 60025
Telephone: 847-328-3409
Fax: 847-328-3425

December 12, 2017

Chairman Ajit Pai
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Pai:

I request that you delay a vote on the Draft "Restoring Internet Freedom" Order (Draft Order), WC Docket No. 17-108, on the December Open Meeting Agenda of the Federal Communications Commission (FCC). Despite your insistence that the Federal Trade Commission (FTC) has the ability and authority to enforce net neutrality violations, both its ability and authority are limited.

I serve as Ranking Member of the Digital Commerce and Consumer Protection Subcommittee of the House Energy and Commerce Committee, which oversees the FTC. I am well aware of its strengths and weaknesses. While I am a strong supporter of the FTC's work on competition and consumer protection, given the limitations of the Commission, the open Internet may not be fully protected.

Unlike the FCC, which is able to create rules of the road for broadband providers, the FTC's hands are tied when it comes to rulemaking. Therefore, the FTC's oversight would be limited to bringing actions against broadband providers *after* they have committed unfair methods of competition or unfair or deceptive acts. Even when it can bring enforcement actions, the FTC cannot impose fines against broadband providers that engage in discriminatory conduct upon their first violation. The FTC is limited to entering cease-and-desist orders. Only violations of those orders result in fines. As we have seen repeatedly, the threat of real consequences – such as strong financial penalties – is the only effective deterrent.

Moreover, the FTC currently lacks the technical expertise for network management. Unlike the FCC, the FTC does not have engineers on staff. It could take years for the Commission to investigate a complaint and obtain an order for, say, discriminating against a rival company. In the meantime, competition will suffer and consumers will lose out.

Even beyond those regulatory and enforcement limitations, it is not even clear if the FTC has any authority over most broadband providers. AT&T Mobility's challenge to the FTC's jurisdiction over non-common carrier activities of telecommunications carriers in *FTC v. AT&T Mobility* is pending *en banc* review in the Ninth Circuit Court of Appeals. Last year, a three-judge panel of the Court held that, under the common carrier exemption, the FTC has no enforcement authority over any entity that is classified as a common carrier.

Most broadband providers are also traditional common carriers. If the Ninth Circuit again finds in favor of AT&T – regardless of what the Draft Order says or whether it is adopted – most broadband providers will still be exempt from the authority of the FTC under the Federal Trade Commission Act's common carrier exemption. Instead of simply shifting oversight and enforcement from the FCC to the FTC as you suggest, the Draft Order could thrust broadband providers into a regulatory blackhole – not subject to any federal oversight at all and leaving consumers unprotected. In fact, the FCC made this exact point in its amicus curiae brief in support of the FTC, asserting:

> If the *en banc* Court were to adopt AT&T's position that the FTC Act's common-carrier exception is "status-based" rather than "activity-based," contrary to the reasoned analysis of the district court below, the fact that AT&T provides traditional common-carrier voice telephone service could potentially immunize the company from any FTC oversight of its noncommon-carrier offerings, even when the FCC lacks authority over those offerings—creating a potentially substantial regulatory gap where neither the FTC nor the FCC has regulatory authority.[1]

Rushing forward with your Draft Order at this time, without considering the relevant facts, is not prudent decision-making. If the so-called "Restoring Internet Freedom" item is passed, the ability to protect the open Internet will be severely diminished if not eliminated altogether.

For these reasons, I fear the Draft Order fails to appreciate the ramifications of the FCC abdicating its role as the expert federal agency overseeing telecommunications. At a minimum, the FCC must conduct a more searching review of its competencies and that of the FTC. As you have noted, a process of hearings and thorough study is necessary to ensure the Commission has a robust record on which to base its decision.[2] I strongly oppose this item in its entirety. But at best, this issue is not yet ripe for consideration until *FTC v. AT&T Mobility* is finally resolved.

Sincerely,

Jan Schakowsky
Ranking Member
Subcommittee on Digital Commerce
and Consumer Protection

---

[1] Brief of the Federal Communications Commission as Amicus Curiae in Support of Plaintiff-Appellee, FTC v. AT&T Mobility, LLC., No. 15-16585 (9th Cir. May 30, 2017).

[2] Federal Communications Commission, Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61, Statement of Commissioner Ajit V. Pai at 96-97 (rel. May 15, 2014).

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

May 24, 2018

The Honorable Jan Schakowsky
U.S. House of Representatives
2367 Rayburn House Office Building
Washington, D.C. 20515

Dear Congresswoman Schakowsky:

Thank you for your letter regarding the *Restoring Internet Freedom Order*, which reestablished the authority of the Federal Trade Commission to oversee the network management practices of Internet service providers while returning to the light-touch legal framework that governed such practices for almost twenty years.

At the dawn of the commercial Internet in 1996, President Clinton and a Republican Congress agreed that it would be the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." This bipartisan policy worked. Encouraged by light-touch regulation, the private sector invested over $1.5 trillion to build fixed and mobile networks throughout the United States. Innovators and entrepreneurs grew startups into global giants. America's Internet economy became the envy of the world.

Then, in early 2015, the FCC jettisoned this successful, bipartisan approach to the Internet and decided to subject the Internet to utility-style regulation designed in the 1930s to govern Ma Bell. This decision was a mistake. For one thing, there was no problem to solve. The Internet wasn't broken in 2015. We weren't living in a digital dystopia. To the contrary, the Internet had been a stunning success.

Not only was there no problem, this "solution" hasn't worked. The main complaint consumers have about the Internet is not and has never been that their Internet service provider is blocking access to content. It's that they don't have access at all or enough competition between providers. The 2015 regulations have taken us in the opposite direction from these consumer preferences. Under Title II, annual investment in high-speed networks declined by billions of dollars—the first time that such investment has gone down outside of a recession in the Internet era. And our recent Broadband Deployment Report shows that the pace of both fixed and mobile broadband deployment declined dramatically in the two years following the *Title II Order*.

Returning to the legal framework that governed the Internet from President Clinton's pronouncement in 1996 until 2015 is not going to destroy the Internet. It is not going to end the Internet as we know it. It is not going to undermine the free exchange of ideas or the fundamental truth that the Internet is the greatest free market success story of our lifetimes.

By returning to the light-touch Title I framework, we are helping consumers and promoting competition. Broadband providers will have stronger incentives to build networks, especially in unserved areas, and to upgrade networks to gigabit speeds and 5G. This means there will be more competition among broadband providers. It also means more ways that companies of all kinds and sizes can deliver applications and content to more users. In short, it's a freer and more open Internet.

The *Restoring Internet Freedom Order* also promotes more robust transparency among ISPs than existed three years ago. It requires ISPs to disclose a variety of business practices, and the failure to do so subjects them to enforcement action. This transparency rule will ensure that consumers know what they're buying and that startups get information they need as they develop new products and services.

Moreover, we reestablish the Federal Trade Commission's authority to ensure that consumers and competition are protected. As you know, the FTC can and has been an aggressive defender of the public interest in this space. It was the FTC that sued AT&T in court for allegedly deceptive conduct—seeking restitution for consumers and the disgorgement of ill-gotten monies—and did so in October 2014, long before the FCC took action. And it was the FTC that successfully won its en banc case in the Ninth Circuit, affirming that it can prosecute ISPs like AT&T even when those ISPs also have common-carrier lines of business. Two years ago, the *Title II Order* stripped the FTC of its jurisdiction over broadband providers by deeming them all Title II "common carriers." But now we are putting our nation's premier consumer protection cop back on the beat.

In sum, Americans will still be able to access the websites they want to visit. They will still be able to enjoy the services they want to enjoy. There will still be regulation and regulators guarding a free and open Internet. This is the way things were prior to 2015, and this is the way they will be in the future.

I appreciate your interest in this matter. Your views are important and will be entered into the record of the proceeding. Please let me know if I can be of any further assistance.

Sincerely,

Ajit V. Pai

Ajit V. Pai